Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MIKE WAYNE GEHNER,

Petitioner,

v.

CITY OF LAS VEGAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the statutory confrontation scheme set forth in NRS 50.315(6) as adopted by the Nevada Supreme Court in *Walsh II, infra*, is unconstitutional under *Crawford v. Washington, infra*, and the Sixth Amendment Confrontation Clause.

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PETITION FOR A WRIT OF CERTIORARI

MIKE WAYNE GEHNER (GEHNER) respectfully prays that a Writ of Certiorari issue to review the Nevada Supreme Court's decision in *Walsh II, infra* on the grounds that it violates *Crawford v. Washington, infra* and the Sixth Amendment Confrontation Clause. *Walsh II, infra* unconstitutionally holds that when a defendant is confronted with a *testimonial* ex parte hearsay statement under NRS 50.315, it is the trial judge that determines whether or not cross examination is permitted, not the Confrontation Clause. Also, review is vital based on the significant number of state trials that are affected by *Walsh II*.

OPINIONS BELOW

1. *City of Las Vegas v. Walsh*, 121 Nev. Adv. Op. No. 85 (December 15, 2005) (*Walsh II*). Appendix (App.) 1-12.

2. *City of Las Vegas v. Walsh*, 120 Nev. Adv. Op. No. 44 (June 11, 2004) (*Walsh I*). App. 16-27.

3. "Conclusions of Law and Order Denying Application for Writ of Mandamus" (filed Apr. 9, 2003). App. 13-15.

JURISDICTION

The instant Petition is filed under 28 U.S.C. § 1257 and the date of the Nevada Supreme Court decision to be reviewed was entered December 15, 2005. (*Walsh II*)

CONSTITUTIONAL PROVISIONS

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

STATUTES INVOLVED IN THIS CASE

NRS 50.315 (This statute is incorporated in the App. 28-31.)

STATEMENT OF THE CASE

Petitioner Gehner challenged the constitutionality of NRS 50.315(4) in *City of Las Vegas v. Walsh*, 120 Nev. Adv. Op. No. 44 (June 11, 2004) (hereinafter *Walsh I*). *Walsh I*, a three-judge panel, held that the affidavit prepared under NRS 50.315(4) was *testimonial* under *Crawford, infra*, and that admission of the affidavit violated Gehner's Sixth Amendment right of confrontation. *Walsh I* stated, "Because the aforementioned Confrontation Clause test was not satisfied in this instance, we conclude that the nurse's affidavit was not admissible." App. 26. The panel subsequently denied appellant *City of Las Vegas'* petition for rehearing, and the City filed a petition for *en banc* reconsideration. The court granted the petition and withdrew the court's June 11, 2004 opinion in *Walsh I*.

In *City of Las Vegas v. Walsh*, 121 Nev. Adv. Op. No. 85 (December 15, 2005) (hereinafter *Walsh II*), the court *en banc* reversed *Walsh I* stating that the statutory confrontation

scheme in NRS 50.315(6) "preserves the rights of an accused under the Confrontation Clause of the United States Constitution." App. 11. The nurse's *testimonial* ex parte hearsay affidavit was held to be admissible at trial even though Petitioner Gehner had no opportunity to cross examine the witness. *Walsh II* is the resurrection of *Ohio v. Roberts, infra*, and violates *Crawford, infra*. NRS 50.315(6) unconstitutionally mandates that it is the judge who determines whether cross examination will be allowed and not the Confrontation Clause. Gehner now seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

WALSH II VIOLATES THE SIXTH AMENDMENT CONFRONTATION CLAUSE

a. Gehner presents an important federal question which affects criminal trials in Nevada, and should be reviewed by this Court under Rule 10(c).

Prior to *Crawford, infra*, Nevada allowed *testimonial* ex parte hearsay statements made under NRS 50.315 to be admitted as evidence against the accused. At Petitioner Gehner's criminal trial, the judge refused to admit the nurse's affidavit because the affidavit contained evidentiary facts not authorized by NRS 50.315. The prosecution challenged the trial judge's ruling which eventually was heard by the Nevada Supreme Court. During the pendency of Gehner's case, *Crawford, infra* was decided and confrontation became an issue under the Sixth Amendment.

The Sixth Amendment Confrontation Clause guarantees that "[i]n all criminal prosecutions" the accused be allowed to cross examine the "witnesses against him." The only exception is when the witness is unavailable and the defendant had a prior opportunity to cross examine that witness' *testimonial* ex parte hearsay statements. *Crawford v. Washington*, 541 U.S. 36 (2004). Ignoring *Crawford*, the Nevada Supreme Court adopted a statutory scheme which operates to deny a criminal defendant his Sixth Amendment Confrontation rights. An accused's constitutional right to cross examination is conditioned on satisfying NRS 50.315(6).[1] In *Walsh II*, the court held that the failure of the accused to satisfy NRS 50.315(6) is deemed a waiver of the defendant's constitutional confrontation rights. "Failure to properly raise a dispute of fact with regard to affidavits admitted under NRS 50.315 constitutes a waiver of the defendant's opportunity to confront the witnesses against him."[2] App. 10. NRS

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[1] NRS 50.315(6) puts the "cart before the horse." A defendant is required to establish a "substantial and bona fide dispute" regarding the *testimonial* ex parte facts before being allowed cross examination of the witness. It is cross examination itself which often produces the disputed fact. In those cases when a defendant does not need or desire cross examination, the state prosecutor can obtain a stipulation accordingly.

[2] *Walsh II* creates inconsistency and error regarding constitutional waivers. In *Raquepaw v. State*, 108 Nev. 1020, 1022-23, 843 P. 2d 364 (1992), the court said, "Counsel cannot waive these [fundamental constitutional] basic trial rights over a client's objection. The right of confrontation is such a right and cannot be waived over objection." (citation omitted). *See also, DeRosa v. Dist. Ct.*, 115 Nev. 225, 234, 985 P.2d 157 (1999) ("Given the trustworthiness of the evidence [NRS 50.315 *testimonial* ex parte hearsay affidavits], only the *statutory right* to confront the witness is implicated, not the Confrontation Clause." (citation omitted.) (emphasis original.) A waiver of a fundamental constitutional right must be "an intentional relinquishment or

(Continued on following page)

50.315(6) provides how a defendant must establish a disputed fact.

> 6. If, at or before the time of the trial, the defendant establishes that:
>
> (a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and
>
> (b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,
>
> the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

Walsh II concluded, "Therefore, we are convinced that NRS 50.315 adequately preserves the constitutional right to confront witnesses against a defendant by providing a statutory confrontation mechanism." App. 10. *Walsh II* violates *Crawford* and resurrects *Ohio v. Roberts*, 448 U.S. 56 (1980). NRS 50.315(6) mandates that it is the judge who determines whether the defendant's claim is a "substantial and bona fide dispute regarding the facts in the affidavit or declaration." Further, it is the judge who decides if "it is in the best interest of justice" to allow cross examination. To add obvious insult to inevitable injury, even if the accused satisfies the first two requirements, the trial judge is not obliged to allow cross examination.

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abandonment of a known right or privilege" by the defendant. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *Walsh II* also violates *Zerbst*.

NRS 50.315(6)(b) holds: "the court *may* order the prosecution to produce the witness. . . ." (emphasis added.) *Walsh II* holds that it is the trial judge who determines whether or not cross examination is permitted, not the Confrontation Clause. *Walsh II's* confrontation waiver scheme is unconstitutional and an affront to the holding of *Crawford*. Petitioner Gehner's Writ of Certiorari should be granted.

CONCLUSION

A judicial determination as to the right of cross examination on *testimonial* ex parte hearsay facts nullifies the Sixth Amendment Confrontation Clause. *Walsh II* violates *Crawford, supra*, and the Sixth Amendment Confrontation Clause. Petitioner Gehner respectfully requests that his Writ of Certiorari be granted.

Respectfully submitted,

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Cite as: City of Las Vegas v. Walsh
121 Nev. Adv. Op. No. 85
December 15, 2005

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 41317

CITY OF LAS VEGAS,

Appellant,

vs.

THE HONORABLE JESSIE WALSH, JUDGE OF THE LAS VEGAS MUNICIPAL COURT, AND MIKE WAYNE GEHNER,

Respondents.

Petition for en banc reconsideration of 120 Nev. 392, 91 P.3d 591 (2004). Appeal from a district court order denying a petition for a writ of mandamus challenging a municipal court's decision in a criminal proceeding. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

Petition granted; opinion withdrawn; reversed and remanded with instructions.

Bradford R. Jerbic, City Attorney, and Edward G. Poleski, Deputy City Attorney, Las Vegas, for Appellant.

Martin D. Hastings, Las Vegas, for Respondent Gehner.

BEFORE THE COURT EN BANC.

OPINION

By the Court, BECKER, C.J.:

This case involves the scope of NRS 50.315(4), which permits the admission of a nurse's affidavit to prove certain facts relating to the withdrawal of blood for testing purposes. It also implicates the construction of that statute in light of the United States Supreme Court's recent holding in *Crawford v. Washington*.[1]

On June 11, 2004, a panel of this court issued an opinion in this case limiting the admissibility of a registered nurse's affidavit in respondent Mike Gehner's trial for driving under the influence of alcohol. This court concluded that the affidavit was testimonial under *Crawford* and that admission of the affidavit violated Gehner's Sixth Amendment right of confrontation.[2] The panel subsequently denied appellant City of Las Vegas's petition for rehearing, and the City then filed a petition for en banc reconsideration. Having considered the City's petition and Gehner's response, we conclude that en banc reconsideration is warranted because this case involves an issue of substantial precedential and constitutional import – the constitutionality of NRS 50.315(4) in light of Crawford.[3] We therefore grant the petition and withdraw the court's June 11, 2004, opinion.

We conclude that the affidavit complied with NRS 50.315(4) and was admissible. Therefore, the municipal and district courts erred in excluding the affidavit for noncompliance with the statute. We further conclude that NRS 50.315(4) is not unconstitutional because it adequately preserves the rights of an accused under the Confrontation Clause of the United States Constitution.[4] Accordingly, we reverse the judgment of the district court